78-1107

No. 77 3738 AAH

In The
Supreme Court of the United States

DECEMBER 1978

CHARLES ARMISTEAD; MARION HILL; LEO WEBB; RUDOLPHO A. TRUJILLO; HAROLD W. JOHNSON: AMERICAN ASS'N OF SPANISH SPEAKING CERTIFIED PUBLIC ACCOUNTANTS; BLACK BUSINESSMEN'S ASS'N OF LOS ANGELES,

Appellants

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, a Nonprofit Corporation; ENGINEERING CONTRACTORS ASSOCIATION, a Nonprofit Corporation; AMERICAN SUBCONTRACTORS ASSOCIATION, A Nonprofit Corporation, LOS ANGELES COUNTY CHAPTER, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., A Nonprofit Corporation; STEVE RADOS, INC., A Corporation; GRIFFITH COMPANY, A Corporation; GORDON H. BALL, INC., A Corporation; STODDARD ENTERPRISES, A Sole Proprietorship; and GRANITE CONSTRUCTION COMPANY, A Corporation,

Appellees

ON APPEAL FROM DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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December 14, 1978

INDEX

CITATIONS

No. Civ. 77 3738 AAH

In The
Supreme Court of the United States

DECEMBER 1978

CHARLES ARMISTEAD, MARION HILL, ET AL.,

Appellants

v.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, ET AL.,

Appellees

ON APPEAL FROM DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

Charles Armistead and Marion Hill, et al., the appellants, appeal from the decision of the United States District Court, Central District of California, dated October 20, 1978, holding that appellees' complaint for declarative and injunctive relief was not moot under Article 3, section 2, clause 1 of the United States Constitution.

OPINIONS BELOW

The opinion of the U.S. District Court, Central District of California, dated November 2, 1977, which the U.S. Supreme Court remanded for Consideration of the issue of mootness on July 3, 1978, 46 U.S.L.W. at 3802, is reported at 441 F.Supp. 955 (C.D. Cal 1977).

JURISDICTION

This direct appeal to the United States Supreme Court from the Order entered in this action on October 20, 1978 entitled Memorandum Opinion and Order That Cause Is Not Moot and From the Summary Judgment for Declaratory and Injunctive Relief is made pursuant to 28 U.S.C. 1252.

QUESTION PRESENTED

Whether the District Court's Order in this action entitled Memorandum Opinion and Order that Cause Is Not Moot was correctly decided under Article III, section 2, Clause 1 of the United States Constitution.

CONSTITUTIONAL PROVISIONS

Article III, section 2, clause 1 of the United States Constitution.

The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the laws of the United States . . .

RAISING THE FEDERAL QUESTION

The United States Supreme Court itself raised the federal question by vacating the District Court Order Granting Declaratory and Injunctive Relief against "Race Quota" System for Federal Grants to Local Los Angeles Agencies entered November 2, 1977 and remanding the cause to the District Court for consideration of the issue of mootness. The issue of mootness was first raised by defendant Department of Commerce in its appeal to the United States Supreme Court of the above-entitled order.

STATEMENT OF THE CASE

On July 22, 1976, the United States Congress enacted the Local Public Works Capital Development and Investment Act of 1976 (42 U.S.C. 6701, *et seq.*). This Act appropriated $2 billion of federal monies for which state and local entities could make application in order to alleviate unemployment and improve public works facilities.

On May 13, 1977, Congress enacted the Public Works Act of 1977 (Pub.L. No. 95-28), amending the 1976 Act. The amendments, among other things, required that at least 10% of the dollar value of each project grant be expended with certain minority business enterprises. (Section 103(f)(2), 42 U.S.C. 6705(f)(2)). On May 27, 1977, the Secretary of Commerce issued regulations implementing Public Law No. 95-28. These regulations restated the requirement that no grant be made under the Act unless at least 10% of the grant amount be expended with minority business enterprises. 42 Fed. Reg 27, 434-35 (May 27, 1977).

The federal defendant had until September 30, 1977, to obligate the funds appropriated by Congress under the 1977 Act. In September, 1977, local defendants began announcing bid requests for projects already approved for federal funding, with bid opening to begin October, 1977.

On October 5, 1977, plaintiffs-appellees filed their Complaint for Declaratory and Injunctive Relief in the U.S. District Court for the Central District of California. In their complaint appellees sought a declaration that the minority business enterprise requirement of the Public Works Employment Act of 1977 and the actions of federal and local defendants pursuant to this requirement were unconstitutional. Appellees also sought an injunction preventing the federal defendant from mandat-

ing that local defendants require bidders to comply with the 10% minority business enterprise quota, preventing the federal defendant from taking actions penalizing noncompliance with the quota and preventing the federal defendant from taking any other action in regard to the requirement. An injunction was also sought to prevent the local defendants from utilizing the minority requirements in their bid specifications for and awards of contracts for projects funded by the Public Works Act of 1977.

On October 6, 1977, appellees moved for and were granted a temporary restraining order restraining the federal defendant from granting any further funds to Los Angeles City and County under the Public Works Employment Act of 1977 for projects which required the 10% minority business enterprise allocation and restraining and local defendants from awarding bids for projects funded by the Act which required the minority allocation.

A hearing on appellees' motion for a preliminary injunction was set for October 31, 1977. On October 21, 1977, the federal defendant filed a motion for summary judgment. Both motions were heard on October 31, 1977, at which time the local defendants and appellees also moved for summary judgment. The District Court then proceeded to hear the case and rule on the merits by consolidating the hearing on the preliminary injunction with the hearing on the permanent injunction under Federal Rule of Civil Procedure 65(a)(2).

The district court issued its decision on November 2, 1977, *Associated General Contractors of California, et al. v. Secretary of Commerce of the United States Department of Commerce, et al.*, 441 F.Supp. 955 (C.D. Cal. 1977). In granting the motion for summary judgment for declaratory and injunctive relief, the district court declared the 10% racial quota mandated by section 103(f)(2) of the Public Works Employment Act of 1977,

42 U.S.C. 6705(f)(2), to be unconstitutional and illegal under the United States Constitution, particularly Amendment V thereof and Title VI of the Civil Rights Act of 1964, particularly 2000d and 2000d-1. The district court also issued a permanent injunction permanently restraining the federal and local defendants from enforcing or applying the racial quota. The injunction, however, was expressly limited to prospective application.

On direct appeal to the United States Supreme Court, the federal defendant urged the Court to vacate the judgment and remand to the district court to consider whether the judgment had become moot, *Juanita Kreps v. Associated General Contractors of California, et al.*, U.S. Supreme Court Docket No. 77-1271. The mootness claim was based on the following ground:

> "As of the time the district court entered its judgment, the record reflected that the Economic Development Administration had obligated all the funds authorized and appropriated under the Act." (Federal Jurisdictional Statement at 6).

On July 3, 1978, the United States Supreme Court vacated the judgment of the district court and remanded the case for consideration of the question of mootness, 46 U.S.L.W. at 3802.

At a hearing held on August 21, 1978, the district court filed and spread the order of the Supreme Court and read the Order, in its entirety, in the record. At that time, the Court issued a briefing schedule to the parties to facilitate the consideration of the question of mootness. In addition, certain parties, among them these appellants, renewed their motions to intervene on behalf of defendants. The court found that the motions for intervention satisfied the requirements of Rule 24 of the Federal Rules of Civil Procedure but limited their participation to only future proceedings.

All parties briefed the question of mootness according to schedule and on October 20, 1978 the district court issued its order entitled Memorandum Opinion and Order That Cause Is Not Moot from which these appellant-defendants appeal.

THE QUESTION IS SUBSTANTIAL

The question of whether this cause is moot is substantial in that by deciding it is not moot the district court put in jeopardy a congressional program for remedying discrimination in the construction industry, encouraging the formation of minority business enterprises and alleviating the high rate of unemployment among minority workers.

In addition there is disagreement among the federal courts as to the constitutionality of the Public Works Employment Act of 1977. Compare *Associated General Contractors of California v. Secretary of Commerce of the United States, et al.,* 441 F.Supp. (C.D. Cal. 1977) with *Constructors' Association v. Kreps,* 573 F2d. 811 (3d. Cir. 1978).

Appellant contends that the district court misapplied the precedents to the set of facts in the case at bar. The court relied heavily on *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976) in making its order that this cause is not moot because it is capable of repetition yet evading review. In the Nebraska Press case, a gag order was placed on the news media for the duration of the time before trial of a murder case. The U.S. Supreme Court held that even though the trial was over by the time the appeal was heard the cause was not moot because capable of repetition. The instant case is concerned with a government-mandated affirmative action program and thus the underlying facts of the two cases are so

different that trying to apply the rule of the case of one to the other is stretching the rules of logic to the breaking point.

In *Nebraska Press Association,* supra, the appellants had been entirely precluded from exercising their First Amendment rights of free speech and press. In the case at bar, however, the plaintiff-appellees were only precluded from bidding on 10% of the government contracts and were free to bid on the other 90%. If they employed minority-owned enterprises as subcontractors, they were free to bid on *all* the government contracts, a minor infringement on any rights the appellees may have had in regard to government contracts and very minor in comparison to the infringement of rights in *Nebraska Press Association,* supra.

A prior restraint on the exercise of the first amendment rights of speech and press have traditionally been regarded as very grave no matter what interests were balanced in favor of the prior restraint. See *Near v. Minnesota,* 283 U.S. 697 (1931). On the other hand, racial classifications, while inherently suspect, are permissible when balanced against an important government interest such as overcoming past discrimination in employment. See *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 442 F2d. 159 (C.A.3d); Certiorari denied, 404 U.S. 1854. Accordingly the Nebraska Press Association case is a weak reed on which to base a decision of mootness because the interests to be protected are different.

II.

Furthermore, when this cause of action was filed in October of 1977, all the contracts had been bidden upon and the funds committed to specific projects. See Federal Jurisdictional Statement on first appeal at 6.

Indicative of Congress' concern with the intractable problems of minority unemployment and employment discrimination is the fact that Congress will most certainly renew the Public Works Employment Act despite the controversy over the 10% minority preference. The renewed act may vary that provision by making it more flexible in that the per centum could vary from 2% to 15% depending on the minority population of the geographic area. The district court in its opinion of October 20, 1978 at 29, lines 3-6 stated this provision would be less intrusive and thus permissible. Because of these two facts — the fact that the Public Works Employment Act of 1977 is completed and the fact Congress is considering a less intrusive manner of remedying the problems the Act addressed — appellants are puzzled about what exactly the district court is enjoining. Since the injunction was framed to operate only prospectively and all the funds have been authorized and the contracts have been let, there appears to be no future act to be enjoined. Is the court attempting to enjoin the Secretary of Commerce, the City of Los Angeles and the County of Los Angeles from acting under a law that no longer exists?

III.

The district court opinion also relied upon *U.S. v. W.T. Grant,* 345 U.S. 629 (1953) and *U.S. v. Concentrated Phosphate Export Association,* 393 U.S. 199 (1968) to bolster its opinion that the present case is not moot because capable of repetition. Both of these cases involve serious wrongdoing on the part of the defendants and a threat to the public welfare from the defendants' acts. In the case at bar, the defendants have done nothing wrong by participating in a federal public works plan aimed at fostering minority enterprise and alleviating unemployment, goals that are very much in the public interest rather than against it.

The plaintiffs-appellees have shown no harm to the public interest in their being precluded from bidding on 10% of the government contracts. Further plaintiffs-appellees do not even demonstrate any harm to themselves which might bring them within the ambit of this Court's holding in *University of California Board of Regents v. Bakke,* 57 L.Ed.2d 750 (1978). They merely allege they have the capability to bid on government contracts but have not done so on account of the fact because of the 10% minority preference they fear they will be denied a bid on the other *90%* of the work.

This is in sharp contrast to the situation of the plaintiff in the Bakke case who suffered actual harm in being twice denied admittance to medical school on account of its minority preference program. Appellees have suffered no harm. They have not lost out on any bids on account of the minority preference provisions. They complain they know of no minority contractors but make no mention of what efforts they have devoted to seeking out minority contractors. The sad fact is if these appellees and others in a like situation took the burden upon themselves to bring minorities into the mainstream of American commerce, there would be no need for government programs like the Public Works Employment Act of 1977 which they claim grieviously harms them.

Appellant contends that for an issue to be moot within the "capable of repetition yet evading review" doctrine, some harm must have befallen the complaining party. A benign act capable of repetition is something to celebrate and a harmless act capable of repetition is nothing to worry about. Where is the harm to plaintiffs-appellees in the case at bar? Is the harm that they might only get 90% of the government contracts instead of 100% as in the past? Is the harm that in order to compete for 100% of the contracts they would have to seek out minority subcontractors? In the panoply of human miseries, these

are puny harms that have come upon these appellees. Is a minority preference provision mandated to remedy past employment discrimination a cognizable harm? See *Bakke*, supra, at 778. If such programs are permissible then plaintiffs-appellees have suffered no harm that is "capable of repetition yet evading review".

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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December 14, 1978

FILED
OCT 20 1978
CLERK,
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA
BY DEPUTY

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CENTRAL DISTRICT
OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, a nonprofit corporation;
ENGINEERING CONTRACTORS ASSOCIATION, a nonprofit corporation;
AMERICAN SUBCONTRACTORS ASSOCIATION, a nonprofit corporation;
LOS ANGELES COUNTY CHAPTER, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a nonprofit corporation;
STEVE P. RADOS, INC., a corporation;
GRIFFITH COMPANY, a corporation;
GORDON H. BALL, INC., a corporation;
STODDARD ENTERPRISES, a sole proprietorship; and
GRANITE CONSTRUCTION COMPANY, a corporation,

Plaintiffs,

v.

SECRETARY OF COMMERCE OF THE UNITED STATES DEPARTMENT OF COMMERCE;

Civ. No.
77-3738-AAH

MEMORANDUM OPINION AND ORDER THAT CAUSE IS NOT MOOT
(After Hearing per Order of U.S. Supreme Court)

U.S. DEPARTMENT OF COMMERCE;
LOS ANGELES COUNTY, a body corporate and politic;
LOS ANGELES COUNTY BOARD OF SUPERVISORS;
LOS ANGELES FLOOD CONTROL DISTRICT;
LOS ANGELES COUNTY ENGINEER;
FACILITIES DEPARTMENT OF LOS ANGELES COUNTY;
CITY OF LOS ANGELES, a municipal corporation;
LOS ANGELES CITY COUNCIL;
DEPARTMENT OF RECREATION AND PARKS OF THE CITY OF LOS ANGELES;
DEPARTMENT OF PUBLIC WORKS OF THE CITY OF LOS ANGELES,
Defendants.

CHARLES ARMISTEAD; MARION HILL; LEO WEBB; RUDOLPHO A. TRUJILLO; HAROLD W. JOHNSON; AMERICAN ASS'N OF SPANISH SPEAKING CERTIFIED PUBLIC ACCOUNTANTS; BLACK BUSINESSMEN'S ASS'N OF LOS ANGELES; and NAACP,
Intervenors

APPEARANCES:

PLAINTIFFS

JOHN H. FINDLEY, ESQ., Pacific Legal Foundation, 455 Capitol Mall, Suite 465, Sacramento, California, 95814; and LAWRENCE H. KAY, ESQ., Associated General Contractors of California, 301 Capitol Mall, Suite 402, Sacramento, California 95814,
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FEDERAL DEFENDANTS

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Attorneys for Federal Defendants, Secretary of Commerce of the United States, and Department of Commerce.

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JOHN F. HAGGERTY, ESQ., Assistant City Attorney, 1700 City Hall East, 200 N. Main Street, Los Angeles, California 90012,

Attorney for City Defendants, City of Los Angeles, Los Angeles City Council, Department of Recreation and Parks of the City of Los Angeles, and Department of Public Works of the City of Los Angeles.

INTERVENORS

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Attorney for Intervenors Charles Armistead, Marion Hill, Leo Webb, Rudolpho A. Trujillo, Harold W. Johnson, American Ass'n of Spanish Speaking Certified Public Accountants, and Black Businessmen's Ass'n of Los Angeles.

HAIRSTON, WEBSTER & JOHNSON, By: JOHN H. SANDOZ, ESQ., 4503 South Broadway, Suite 202, Los Angeles, California 90037,
Attorneys for Intervenor NAACP.

I. INTRODUCTION

Following this Court's ruling, given orally on October 31, 1977, and by way of written opinion dated November 2, 1977, that the 10% minority business enterprises provision of the Public Works Employment Act, as amended, 42 U.S.C. § 6705(f)(2), violated both the constitutional safeguard of equal protection, U.S. Const. amends. V and XIV, and Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 2000d and § 2000d-1,[1] all parties appealed directly to the United States Supreme Court under the provisions of 28 U.S.C. § 1252.[2] On July 3, 1978, the Supreme Court upon consideration of the three separate appeals ordered the judgment of this Court vacated and further ordered the cause remanded to this Court "to consider the question of mootness."[3]

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[1] 441 F.Supp. 955 (C.D. Cal. 1977). The Court granted both declaratory and injunctive relief to the plaintiffs. *Id.* at 1044.

[2] Section 1252 provides as follows:

§ 1252. Direct appeals from decisions invalidating Acts of Congress

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court. June 25, 1948, c. 646, 62 Stat. 928; October 31, 1951, c. 655, § 47, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), (f), 72 Stat. 348; March 18, 1959, Pub.L. 86-3, § 14(a), 73 Stat. 10.

[3] The Order of the Supreme Court provided, in full, as follows:
SUPREME COURT OF THE UNITED STATES
Nos. 77-1067, 77-1078 and 77-1271
Los Angeles County et al.,

Appellants,

At a hearing held on August 21, 1978, this Court filed and spread the order of the Supreme Court and read said Order, in its entirety, into the record. At that time, the Court issued a briefing schedule to the parties in order to facilitate the consideration by this Court of the mootness question.[4] The parties have now, in accordance with

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v.

Associated General Contractors of California, et al.;

Appellants,

v.

Juanita M. Kreps, Secretary of Commerce et al.; and Juanita M. Kreps,

Appellant,

v.

Associated General Contractors of California et al.

APPEALS from the United States District Court for the Central District of California.

THESE CAUSES having been submitted on the statements of jurisdiction and motions to affirm,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the United States District Court in these cases is vacated; and that these causes are remanded to the United States District Court for the Central District of California to consider the question of mootness.

July 3, 1978

.... U.S. .... (1978). See 46 U.S.L.W. 3802.

The federal defendants initially raised the possibility of mootness in their jurisdictional statements before the Supreme Court and repeated the suggestion of mootness in another memorandum before that Court. Jurisdictional Statement in No. 77-1271 (filed March 13, 1978), at 6-8; Memorandum for the Secretary of Commerce in Nos. 77-1067 and 77-1078 (filed March 23, 1978), at 2-3.

[4] The Court established this briefing schedule by way of an Order to Show Cause, which provided in full as follows:

Pursuant to the order of the Supreme Court entered therein on July 3, 1978, ... U.S. ...., Nos. 77-1067, 77-1078 and 77-1271, this Court herewith files and spreads the mandate thereof, and must now consider the question of whether the issues raised in this action are moot. Accordingly, it is hereby ordered that both plaintiffs and defendants show cause upon this question of mootness by the following procedure:

1. Both sides shall serve and file all initial memoranda, points and authorities, affidavits, and all other pleadings desired by them on or before September 11, 1978.

the briefing schedule, fully briefed the issues involved regarding the question of mootness. The defendants basically argue that because the Secretary of Commerce has already granted all of the funds allocated and appropriated under the Act, this Court's declaratory judgment and injunction no longer present a viable case or controversy. While apparently agreeing with the facts of the defendants' assertions, the plaintiffs argue that various aspects of the mootness doctrine compel a finding that the case is not moot. In addition, certain parties have renewed motions to intervene, which are opposed by the plaintiffs.

After full consideration and review of all the briefs, other pleadings, and affidavits submitted and filed by all of the parties, and the arguments thereon at the hearing held on this question of mootness on October 16, 1978, this Court finds and concludes that: (1) the motions to intervene should be granted, but limited to participation on the question of mootness and in any future proceedings; (2) the case is not moot; (3) the motions to dismiss are denied; and (4) the judgment of this Court is reinstated in full.

II. MOTIONS TO INTERVENE

After the court issued its "Summary Judgment for Declaratory and Injunctive Relief" in this case on November 2, 1977, Charles Armistead, Marion Hill, and other individuals and organizations, hereinafter referred

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2. Both sides shall serve and file any and all memoranda, points and authorities, affidavits, and other pleadings they desire to submit in opposition to said initial filings on or before October 9, 1978.
3. Both sides shall be present for an oral hearing on the question of mootness on October 16, 1978, at 10:00 a.m.

Counsel for the parties who had moved this Court for intervention may renew their respective motions for intervention and are also invited to file pleadings in accordance with the above schedule.

to collectively as the Armistead-Hill group, and the Los Angeles Chapter of the National Association for the Advancement of Colored People, hereinafter referred to as the NAACP, filed separate motions for leave to intervene in the case.[5] Before the regularly scheduled hearing on these two motions,[6] all the original parties to the case filed their notices of appeal to the United States Supreme Court.[7] At a hearing held on December 12, 1977, the Court denied these motions to intervene for two reasons. First, once the original parties had filed their notices of appeal to the United States Supreme Court, this Court lacked jurisdiction to entertain the motions for intervention. Second, even if the Court had had jurisdiction to entertain the motions, the parties had not brought the motions in a timely fashion as required by rule 24 of the Federal Rules of Civil Procedure. See 77 F.R.D. 31 (C.D. Cal. 1977). The Court also recommended that the applicants for intervention seek leave to participate in the appeals pending before the Supreme Court as amicus curiae. *Id.* at 36 n.6. The applicants for intervention filed separate notices of appeal to the Court of Appeals for the Ninth Circuit from this decision; but on August 28, 1978, the Court of Appeals dismissed the appeal of the Armistead-Hill group for failing to perfect the record on appeal.[8]

Following the remand of this action to this Court by the Supreme Court on July 3, 1978, this Court, as stated

[5] The Armistead-Hill group moved to intervene on November 14, 1977; the NAACP moved to intervene on November 25, 1977.

[6] The hearing on both motions were regularly set for hearing on December 12, 1977, under this Court's 17-day rule. Local Rule 3(e).

[7] The city defendants filed their notice of appeal on December 1, 1977; the county defendants, federal government defendants, and the plaintiffs all filed their notices of appeal on December 2, 1977.

[8] The Court has not yet filed and spread the mandate of the Court of Appeals in this matter.

above, issued an "Order To Show Cause Re Question Of Mootness As Per Order Of United States Supreme Court" on August 21, 1978. After establishing the briefing schedule on the question of mootness, this Order invited the parties who had earlier sought intervention to renew their motions for intervention and to file pleadings on the mootness question in accordance with the briefing schedule.[9] As suggested in the Court's Order, the parties who had earlier sought leave to intervene — the Armistead-Hill group and the NAACP — have, in addition to filing briefs on the mootness question, renewed their motions to intervene. The plaintiffs oppose the motions; the original defendants have all remained silent with respect to the motions.

A. Requirements of Rule 24

Both the Armistead-Hill motion and the NAACP motion seek intervention of right, or alternatively, permissive intervention. The plaintiffs contend that neither theory justifies intervention here.

Under rule 24 of the Federal Rules of Civil Procedure, a party is entitled to intervention of right upon a timely application

> . . . when the applicant claims an interest relating to the property or transaction which is the subject to the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). In this case, the applicants for intervention, who are either minority contractors or associations representing minority contractors, obviously have an interest relating to the subject matter of the action. Furthermore, the disposition of this action

[9] *See* note 4 *supra.*

obviously might impair or impede their ability to protect that interest. The plaintiffs do not seriously challenge the motions on these grounds. Thus, the proposed intervenors meet two parts of the test for intervention of right under rule 24(a)(2). Two other parts of that test remain, however: (1) do the present defendants adequately represent the interests of the applicants? and (2) are the motions timely?

B. Adequacy of Representation

In attempting to demonstrate that the original defendants did not adequately represent the interests of the minority contractors, the NAACP argues that it could present defenses to the action not raised by the original defendants and that it has been left to the NAACP and other applicants for intervention "to play the role of the true adversary, clearly demonstrating the inadequately [*sic*] of the representation by the present defendants."[10] Specifically, the NAACP criticizes the federal and local defendants for, *inter alia,* failing to substantiate the alleged history of discrimination against minority contractors, failing to demonstrate that no less intrusive alternative exists to the 10% race quota provision found in the PWE Act, and for failing to file motions for review of the summary judgment issued by this Court. In addition, the NAACP alleges that the government has a conflict of interest in that it allegedly is interested in distributing the funds in question without sufficient regard to seeing that minority contractors obtain their rightful

[10] NAACP Motion To Intervene As A Defendant, at 4-6 (filed September 11, 1978).

[11] NAACP Motion To Intervene As A Defendant, at 4-6 (filed September 11, 1978); NAACP Memorandum of Points and Authorities In Support of Motion For Leave To Intervene, at 6 (filed September 11, 1978).

percentage of those funds.[11] The Armistead-Hill motion contains similar arguments.[12]

The plaintiffs contend, on the other hand, that the Court should assume, absent a compelling showing to the contrary, that the government adequately represents the "public interest" here.[13] But while the various governmental defendants may indeed represent the overall public interest, these defendants may not necessarily represent the interests of the applicants for intervention, just as these defendants, while representing the "public interest" do not represent necessarily the interests of the plaintiffs.

Since the Court must, under rule 24, resolve any doubts on this question of adequacy of representation in favor of permitting intervention, see 7A C. Wright & A. Miller, Federal Practice and Procedure, § 1909, at 520-22 (1972), the Court finds, in the circumstances of this case, that the original defendants do not adequately represent the applicants for intervention.

C. Timeliness of the Motions

As discussed above, the Court found, on ruling on the earlier motions to intervene, that, in addition to lacking jurisdiction to grant the motions, the applicants for intervention had not filed their motions in a timely fashion as required by rule 24(a). See 77 F.R.D. at 36-39. The plaintiffs again contend here that the motions remain untimely, essentially for the same reasons expressed in the Court's earlier opinion.

[12] Armistead-Hill Notice of Motion and Motion To Intervene, at 4, 5 (filed September 12, 1978). *See also* Affidavits of Charles Armistead and Marion Hill (filed with motion on September 12, 1978).

[13] Plaintiff's Opposition To Motion of N.A.A.C.P. To Intervene, at 2 (filed September 21, 1978).

In a case decided subsequent to this Court's earlier decision on the prior motions to intervene, the Court of Appeals for the Ninth Circuit listed three factors to be weighed in determining whether a motion to intervene is timely: (1) the stage of the proceeding; (2) the possibility of prejudice to the other parties; and (3) the reason for and the length of the delay. *Alaniz v. Tillie Lewis Foods,* 572 F.2d 657, 659 (9th Cir. 1978) (per curiam). In addition, the Court of Appeals, in the *Alaniz* case, reiterated the views expressed in this Court's earlier opinion that the question of timeliness in this context lies in the sound discretion of the district court and that the question of timeliness should be handled more liberally in the context of a motion for intervention of right. *Compare* 572 F.2d at 659 *with* 77 F.R.D. at 36-37.

Another decision of the Ninth Circuit, set as it is in a closely analogous procedural context, is also particularly relevant. In *Johnson v. San Francisco Unified School District,* 500 F.2d 349 (9th Cir. 1975) (per curiam), the district court had found a motion to intervene untimely. After vacating and remanding the case to the district court for rehearing of the merits of the case, the Court of Appeals, while suggesting that it would have ordinarily affirmed the district court's order on the motion to intervene, instructed the district court to permit the moving parties to intervene following the remand. In this case, of course, as in the *Johnson* case, an appellate court has remanded this action and parties have sought intervention.

After considering the factors listed in the *Alaniz* case, the liberality with which the timeliness question is considered in the context of motions for intervention of right, the *Johnson* case, and the Court's ability to impose conditions on intervenors in order to promote the efficient conduct of litigation,[14] the Court hereby grants the

[14] The Advisory Committee Note to rule 24 provides as follows:
An intervention of right . . . may be subject to appropriate conditions or restrictions, responsive among other things to the requirements of efficient conduct of the proceedings.
See also McDonald v. E. J. Lavino Co., 430 F.2d 1065, 1073 n.7 (5th Cir. 1970); Ionian Shipping Co. v. British Law Ins. Co., 426 F.2d 186, 191-92 (2d Cir. 1970); Smuck v. Hobson, 408 F.2d 175, 179-80 (D.C. Cir. 1969).

motions to intervene but liimts that intervention to participation in future proceedings in this case. This means that the intervenors' proposed answers, lodged with the Court in compliance with the requirements of rule 24(c),[15] will not be filed and will remain only lodged, but that the intervenors are able to file and in fact have actually filed their briefs on the mootness question now before the Court and may participate in any future appeals. This resolution of the motions serves to avoid any prejudice to the plaintiffs, prevents relitigation of issues already decided, and reminds the intervenors of the need for prompt intervention in this type of case.

Thus, the Court hereby finds that the applicants for intervention do satisfy the requirements of rule 24 and orders the motions to intervene granted, but further orders that the intervenors' participation be limited to participation in the instant and any future proceedings in this case.

III. MOOTNESS

Under Article III of the United States Constitution, a federal court may only hear cases involving actual cases or controversies and may not hear moot cases. *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975); *DeFunis v. Odegaard,* 416 U.S. 312, 316 (1974) (per curiam); *Steffel v. Thompson,* 415 U.S. 452, 458-60 (1974); *North*

[15] In pertinent part, rule 24(c) provides that a motion for intervention "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." In this case, both the Armistead-Hill group and the NAACP submitted proposed answers to the plaintiff's original complaint, but did not seek any postjudgment relief.

Carolina v. Rice, 404 U.S. 244, 246 (1971). *See also White v. Regester,* 422 U.S. 935 (1975) (per curiam); *Sosna v. Iowa,* 419 U.S. 393, 402 n.12 (1975). The determination of whether a case is moot, however, is often extremely difficult. *See* C. Wright, Handbook of the Law of Federal Courts, § 12, at 39 (3d ed. 1976). The instant case presents an example of how difficult the question of mootness can become.

On the one hand, the defendants and intervenors argue that the injunction issued by this Court on November 2, 1977, did not apply to federal funds "heretofore granted"; that the entire $6 billion allocated and appropriated by Congress had been and has been "granted" to local grantees; and that, therefore, the Court's ruling does not have any current practical effect. Accordingly, the defendants and intervenors argue, the case is moot and any opinion by this Court would be an unconstitutional advisory opinion. On the other hand, the plaintiffs, while conceding many of the defendants' facts, argue that various aspects of the law dealing with mootness demonstrate that the case is not moot. After considering all the arguments of the parties, the Court finds that the plaintiffs' arguments with respect to mootness are convincing, as the following subsections of this opinion will demonstrate.

A. "CAPABLE OF REPETITION, YET EVADING REVIEW" DOCTRINE

A long, established line of Supreme Court decisions holds that an otherwise moot case is not moot if it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. I.C.C.,* 219 U.S. 498, 515 (1911). *See Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 546-47 (1976); *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975); *Sosna v. Iowa,* 419 U.S. 393, 398-400 (1975); *DeFunis v.*

Odegaard, 416 U.S. 312, 318-19 (1974) (per curiam); *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 121-22 (1974); *Roe v. Wade,* 410 U.S. 113, 125 (1973); *Dunn v. Blumstein,* 405 U.S. 330, 333 n.2 (1972); *Moore v. Ogilvie,* 394 U.S. 814, 816 (1969); *Carroll v. President & Comm'rs of Princess Anne,* 393 U.S. 175, 178-79 (1968). *See also Williams v. Alioto,* 549 F.2d 136, 142 (9th Cir. 1977); *Knuckles v. Weinberger,* 511 F.2d 1221, 1222 (9th Cir. 1975); C. Wright, Handbook of the Law of Federal Courts, § 12, at 39-40 (3d ed. 1976); Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672, 1685-87 (1970).

As the Supreme Court has interpreted this doctrine, two separate inquiries must be made. First, the Court must inquire whether the situation presented in the case is capable of repetition. Second, the Court must inquire whether the case will likely evade review. *See Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 546-47 (1976); *Williams v. Alioto,* 549 F.2d 136, 145 (9th Cir. 1977). Thus, this Court's duty is to inquire as to the presence of both parts of this two-pronged test, as the Courts have interpreted them, in the light of the facts of the instant case.

1. "Capable of repetition".

In determining whether a case involves action that is "capable of repetition," the Supreme Court has faced a variety of procedural and factual situations. In *Carroll v. President & Comm'rs of Princess Anne,* 393 U.S. 175 (1968), for example, the Court decided to review, over objections of mootness, the merits of a trial court's issuance of a 10-day temporary restraining order after the 10-day period of the order had passed, finding that the underlying question involved in the case — whether the order infringed on first amendment rights — persisted. Similarly, in *Roe v. Wade,* 410 U.S. 113 (1973),

the Court found that a woman could press her challenge to a state antiabortion statute despite the fact that she was no longer pregnant by holding that the action was capable of repetition. In *DeFunis v. Odegaard,* 416 U.S. 312 (1974) (per curiam), the Court ruled that a law student, already registered for his final year of studies, suing only for a mandatory injunction compelling his admission into law school did not have a case capable of repetition because he would never again confront the admissions policies of the law school in which he was already registered.

The most recent Supreme Court decision dealing with the "capable of repetition" question is *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976). In that case, a trial judge in a state murder prosecution has issued a gag order temporarily restraining pretrial publicity of the case; by its own terms, the order expired at the time the court empanelled a jury. The defendant appealed the question of whether the order violated the first amendment and the Nebraska Supreme Court modified the order and remanded the case back to the trial court. The defendant appealed and the Supreme Court then accepted certiorari in the case, but denied an application for a stay of the state court proceedings, thus permitting the case to go to trial. By the time the Supreme Court decided the merits of the appeal, the defendant had been convicted in the murder trial and sentenced to death and had an appeal from the conviction pending in the state courts of Nebraska. The Supreme Court opinion, before reaching the first amendment issues involved, thus had to consider whether the appeal from an already expired order was moot. Applying the "capable of repetition, yet evading review" doctrine, the Court found that the case was not moot. Specifically, the Court found that the case was "capable of repetition" because: (1) "if" the Nebraska Supreme Court reversed the conviction and

ordered a new trial, the trial court "may" enter another gag order; and (2) state law authorized Nebraska prosecutors to seek such orders in appropriate cases and could do so again. 427 U.S. at 546-47.

While the Supreme Court's application of this "capable of repetition" issue is not always precisely clear, *see* C. Wright, Handbook of the Law of Federal Courts, § 12, at 39 (3d ed. 1976), the *Nebraska Press Ass'n v. Stuart* decision, the Supreme Court's most recent analysis of this issue, does make clear that in order to be "capable of repetition" in this context, a problem need not be certain to recur. Rather, the test is whether a reasonable expectation of recurrence of the problem exists. *See Williams v. Alioto,* 549 F.2d 136, 143 n.8 (9th Cir. 1977) ("The focus is on whether the same issues, arising from a repetition of a similar law or action, are likely to recur."); *Knuckles v. Weinberger,* 511 F.2d 1221, 1222 (9th Cir. 1975).

In this case, the plaintiffs argued that the problem presented here is capable of repetition because Congress was considering several modified plans to authorize further federal funding for local public works construction projects which include minority business enterprise provisions similar to that found unconstitutional by this Court. The defendants and intervenors, however, argued that the proposed bills differ from the statute held unconstitutional by this Court; that the Congress may not pass the bills in question; that the President may veto such bills, if passed; and that, therefore, it is mere speculation that Congress will spend further federal funds by way of an act including a 10% minority business enterprises provision. Accordingly, the defendants and intervenors argued, the requirements of the "capable of repetition, yet evading review" doctrine have not been met.

Before Congress adjourned on October 15, 1978, one

day before the hearing on the question of mootness and after all the parties had filed their briefs on the question of mootness, three bills were introduced in Congress which would have authorized further federal funding for local public works construction projects and included benefits for minority business enterprises. The first bill, H.R. 11610, initially amounted merely to a $4 billion increase in funds for the Local Public Works Capital Development and Investment Act of 1976, which, as amended, includes the 10% race quota provision. Several Congressmen joined in sponsoring this bill on March 16, 1978, and it was referred to the House Committee on Public Works and Transportation on that date.[16]

On June 6, 1978, several Congressmen introduced a second bill in the House. This bill, H.R. 12993, would have, if passed, enacted the "Labor Intensive Public Works Act of 1978" and would have authorized $1 billion for local construction projects during each of the next three years. Under the terms of H.R. 12993, the grantees and subgrantees of these funds must spend a "prescribed share" of the funds for "minority business enterprises", which are defined in this bill just as they are defined in the PWE Act held unconstitutional by this Court. Rather than allocate a fixed 10% of those funds to MBE's however, H.R. 12993 provided that this "prescribed share" shall reflect the percentage of minority group members in the community and absolutely fixes the "share" at between 2-15% of the funds, "targeting" 10% of the nationwide funds for minority business enterprises. H.R. 12993, § 1206(d). This bill, like H.R. 11610, was referred to the House Committee on Public Works and Transportation following its introduction.[17]

On June 8, 1978, a like bill, S. 3186, with a 2-15% quota and a 10% minority target, was introduced in the Senate

[16] 124 Cong. Record H.2184 (daily ed. March 16, 1978).

[17] 124 Cong. Record H.5062 (daily ed. June 6, 1978).

and then referred to the Senate Committee on Environment and Public Works.[18] The Senate Regional and Community Subcommittee of the Senate Committee on Environment and Public Works held hearings on this bill, but took no further action.

The House, however, took some further action on H.R. 11610 before adjournment. On August 16, 1978, the House Subcommittee on Economic Development reported out a revised version on H.R. 11610. The revised bill would authorize $3 billion for construction projects during each of 1979 and 1980 and would, like H.R. 12993 and S. 3186, adopt the 2-15% minority business enterprise quota provision and the 10% target figure. The full committee did not act on this bill before adjournment.

Thus, this Court must decide whether these bills demonstrate that the problems presented in this litigation are "capable of repetition" as that term has been interpreted by the appellate courts, *i.e.*, is reasonably likely to recur. After a thorough consideration of this question, the Court must find that these bills, despite the change from a rigid 10% quota to a slightly more flexible 2-15% quota with a 10% nationwide "target," do demonstrate that the problems involved in this litigation are "capable of repetition" as the Supreme Court and the Ninth Circuit have interpreted that standards. Congress has not amended or repealed § 6705(f)(2), but rather has demonstrated its intent to distribute again federal funds based on a person's race, and race alone, by way of some sort of race quota provision, to the exclusion of nonminority contractors and without a sufficient finding of prior discrimination. This intent, reflected in the three bills — H.R. 11610, H.R. 12993, and S. 3186 — demonstrates that Congress will likely allocate and appropriate further funds using a quota and that the problems presented in this litigation are reasonably likely to recur and, there-

[18] 124 Cong. Record S.8845 (daily ed. June 8, 1978).

fore, are "capable of repetition." See *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976); *Roe v. Wade,* 410 U.S. 113 (1973); *Carroll v. President & Comm'rs of Princess Anne,* 393 U.S. 1975 (1968).

2. "Yet Evading Review"

In addition to finding that the problem is "capable of repetition," the Court must also find, under the double-pronged test set forth in *Nebraska Press Ass'n v. Stuart,* that the problem will evade review before the Court can rule a case not moot under the double-pronged test of the "capable of repetition, yet evading review" doctrine. Analysis of this element, due to the interpretative gloss put on it by the appellate courts, shows that the problem will evade review.

Both the Supreme Court and the Court of Appeals for the Ninth Circuit have stated that by "review," this element of the test should be interpreted to mean that the case might evade *appellate* review. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 547 (1976); *Roe v. Wade,* 410 U.S. 113, 125 (1973); *Williams v. Alioto,* 549 F.2d 136, 142 (9th Cir. 1977) ("The case should be within a class normally incapable of appellate review because of the lapse of time"). *See also* 6A Moore's Federal Practice, ¶ 57.13, at 57-133 to 57-136.

In this case, a deliberate and considered appellate review would be impossible, should Congress authorize and appropriate further federal funds for minority business enterprises, due to the speed with which Congress has in the past and will undoubtedly in the future legislate that the funds be spent. Under the Act held unconstitutional by this Court, the Secretary of Commerce had to decide whether each application for funds under the Act was proper within 60 days of her receipt of the application. 42 U.S.C. §§ 6705(d), 6706. In addition,

under Round II of the Act, Congress appropriated the authorized $4 billion of the Act on May 13, 1977 and required the Secretary of Commerce to grant those funds by September 30, 1977.[19] Similarly, under the bills currently under consideration by Congress, the Secretary of Commerce would also have to grant any funds with great speed. Under H.R. 11610, as amended, the Secretary must, just as in Rounds I and II, decide on each application for a grant within 60 days after receipt of the application. H.R. 11610, § 1106(c). Under both S. 3186 and H.R. 12993, an applicant for a grant must submit an application for funds within 90 days of the publication of notice of allocation of funds and the Secretary of Commerce must approve or disapprove of the application within 90 days. S. 3186, § 1205(b)(1); H.R. 12993, § 1205(b)(1). Thus, the speed which Congress has dictated, and will dictate again, to bind the Secretary of Commerce in spending these federal funds will preclude any opportunity for considered appellate review prior to the dates by which the funds will be exhausted. Consequently, under the precedents of *Nebraska Press Ass'n v. Stuart, Roe v. Wade,* and *Williams v. Alioto,* the Court finds that the problems here will likely evade review, as the Supreme Court and the Court of Appeals for the Ninth Circiut have interpreted that latter part of the two-pronged test of the "capable of repetition, yet evading review' doctrine.

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[19] Because of the speed with which the funds were to flow under the Act, the official strategy of the Department of Justice in defending the various actions brought against the Act in question was simply to stall litigation for as long as possible in order to keep the funds flowing. Remarks of David Rose, Esq., Chief, Employment Section, U.S. Department of Justice, Civil Rights Division, at Seminar on "Defense of the Public Contract Reverse Discrimination Case," at conference on "Employment Discrimination and the Law" held at the University of Southern California Law Center, January 6, 1978.

3. Conclusion

The Court therefore necessarily must find that the case is both capable of repetition and likely to evade review. Since both prongs of the two-pronged test for this doctrine established by the Supreme Court and the Court of Appeals for the Ninth Circuit have been met, the Court must hold that the case is not moot. The Court also wishes to note that this conclusion, reached as to both the declaratory judgment and the injunction issued by the Court on November 2, 1977, seems particularly appropriate with respect to the declaratory judgment that the 10% minority business enterprises provision is unconstitutional.

B. *W. T. GRANT — CONCENTRATED PHOSPHATE* DOCTRINE

The plaintiffs also argue that the case is not moot under the precedents of *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953) and *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968). The doctrine found in these cases, while similar to, is distinct from the "capable of repetition, yet evading review" doctrine. *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (per curiam).

In *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), the government brought an action under the Clayton Act alleging that an individual and several corporations had violated the Act's prohi' ition against interlocking corporate directorates. Soon after the filing of the complaints, the "interlocking" director resigned from the boards of directors of three of the corporations in question and the defendants then moved to dismiss the action against them as moot. The district court granted the motion and the government appealed to the Supreme Court.

On appeal, the Supreme Court ruled that the case was *not* moot, stating:

> . . . voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. A controversy may remain to be settled in such circumstances, *e.g.*, a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

345 U.S. at 632 (footnotes and citations omitted). The Court also found, however, that a case in a similar situation could be found moot if the defendant were able to bear the "heavy" burden of demonstrating that there is no reasonable expectation that the wrong will be repeated. *Id.* at 633. In addition, the Court found that a district court's power to issue injunctive orders also survives the discontinuance of the allegedly illegal conduct. *Id.* On the facts of the case before it, the Supreme Court found that the defendants' statement that the interlocking no longer existed and their disclaimer of intent to resume such interlocking was insufficient to render the case moot.

In *United States v. Concentrated Phosphate Export Ass'n* 393 U.S. 199 (1968), the government brought an antitrust action regarding the defendants' sales of goods to Korea. The defendants convinced the district court that they were exempt from the antitrust laws, the district court dismissed the action, and the government appealed. After the district court's decision, however, the association defendant dissolved itself after new governmental regulations rendered it uneconomical for

it to continue in its business, and then argued on appeal that the case was moot. Reiterating the W. T. Grant principles, the Court found the case not moot in the following language:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave "[t]he defendant . . . free to return to his old ways." A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. But here we have only appellee's own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes.

393 U.S. at 203 (citations omitted).[20]

In this case, the defendants and intervenors have not carried the "heavy" burden on this "stringent" test of demonstrating mootness for several reasons.

First, the federal defendants have repeatedly clouded the issues involved with the status of the funds under the

[20] In addition to the *W.T. Grant* and *Concentrated Phosphate* cases, the Supreme Court has discussed the "voluntary cessation of allegedly illegal conduct" doctrine established therein on two other occasions. In DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam), the Court found the doctrine inapplicable because in that case the University of Washington had not ceased its allegedly unlawful conduct at all; rather, the school had argued that the case was moot because DeFunis had already been admitted and registered for his final year of study. In Preiser v. Newkirk, 422 U.S. 395 (1975), the Court also found the doctrine inapplicable to a case in which a prisoner sought review of his transfer from a medium security institution to a maximum security institution because the authorities had subsequently transferred him to a minimum security institution and further because the authorities harbored no resentment toward the plaintiff, thus demonstrating to the Court that there was no reasonable expectation that the allegedly unlawful conduct would recur.

Act. In support of their earlier motion for summary judgment, the federal defendants submitted an affidavit from the Chief of the Program Analysis Division of the Economic Development Administration of the Department of Commerce. This affidavit suggested that as of September 30, 1977, $2 billion remained to be spent, nationwide, under the Act. Sulvetta Affidavit, Attachment N to the Federal Defendants' Motion for Summary Judgment (filed October 21, 1977).[21] Then, at the oral hearing on the parties' cross-motions for summary judgment, counsel for the Secretary of Commerce, Ms. Deborah P. M. Seymour, in response to questioning by the Court, expressly stated that $2 billion remained.[22] On November 15, 1977, however, Ms. Seymour wrote a letter to the Court indicating her views that all the funds allocated and appropriated by Congress for use under the Act had been granted.[23]

Now, the federal defendants argue that as of September

[21] See 441 F.Supp. at 970-71. The Court relied heavily on the Sulvetta affidavit in ruling that its injunctive order should apply prospectively only.

[22] Transcript of October 31, 1977 hearing, at 130-33. At this point in the hearing, the Court was discussing with the parties whether the injunction should apply retroactively or prospectively. Among her other comments, Ms. Seymour made the following comments:

> MS. SEYMOUR: Well, on an injunction only against unappropriated funds, your Honor, there would be an opportunity for review and it would not harm the public.
>
> THE COURT: Of course, because you've got $2 billion more coming up that haven't been appropriated, right?
>
> MS. SEYMOUR: Yes, your Honor.

Transcript at 133, lines 6-12.

It should also be noted, however, that counsel for the plaintiff also thought, apparently, that $2 billion remained to be spent. See Transcript at 155.

[23] At that time, the Court treated this letter as a motion for reconsideration and, as such, denied it.

30, 1977, no funds remained to be spent under the Act and support this argument with affidavits of an Assistant Secretary of Commerce and an attorney for the EDA. The briefs filed by the Secretary of Commerce dealing with the question of mootness, however, do not contain any further affidavit from Sulvetta nor explain in any way the apparently contradictory evidence. Counsel for the Secretary could only state at the oral hearing regarding mootness that the Sulvetta affidavit was "ambiguous." As for counsel's statement to the Court on October 31, 1977, that $2 billion remained, counsel for the Secretary of Commerce wrote to the Court on November 15, 1977, as already noted, supposedly "clarifying" the status of the funds,[24] but without mentioning the Sulvetta affidavit, which was the only evidence before the Court at the time it issued its decision. Moreover, the Secretary of Commerce now admits to presenting inaccurate facts before the Supreme Court in arguing mootness there. In both her jurisdictional statement and a subsequent memorandum filed in that Court, the Secretary of Commerce stated that "all the contracts for the 65 projects in the Los Angeles area that were the subject of the appellees' suit have been let in compliance with Section 103(f)(2)."[25] Now, however, after further inquiry prompted by the plaintiffs' challenge to this statement, the Secretary of Commerce admits that this statement to the Supreme Court, which may have in part prompted that Court's Order of remand, was "inadvertently in error."[26] The net result of this conduct of the litigation by the Secretary of Commerce served to foster confusion

[24] See Reply Memorandum for the Secretary of Commerce on the Question of Mootness (filed October 4, 1978), at 4.

[25] Jurisdictional Statement in No. 77-1271 (filed March 13, 1978), at 6; Memorandum for the Secretary of Commerce in Nos. 77-1067 and 77-1078 (filed March 23, 1978), at 2.

[26] Reply Memorandum for the Secretary of Commerce on the Question of Mootness (filed October 4, 1978), at 4.

regarding the status of funds; such confusion does not amount to the carrying successfully of a "heavy" burden.

Second, neither the defendants nor the intervenors have shown any evidence to convince the Court that Congress will not again distribute more funds to contractors solely on the basis of race. Congress has not yet amended or repealed the Act held unconstitutional by this Court and seems intent, as reflected in the three bills discussed in the preceding section, upon continuing to appropriate funds to projects which contain minority business enterprise quotas. None of the defendants can contradict this.

Therefore, for these reasons, and also for the reasons set forth in the preceding section of this opinion, the Court finds that the defendants have not carried their "heavy" burden on the "stringent" test for mootness. All in all, the defendants have failed to convince the Court that their allegedly wrongful conduct is not reasonably likely to recur within the meaning of the *W. T. Grant — Concentrated Phosphate* doctrine. This case presents a good example of a case in which a finding of mootness would leave the defendants "free to return to [their] old ways." Accordingly, the Court holds that the case is not moot under the doctrine established by the Supreme Court in *United States v. W. T. Grant* and *United States v. Concentrated Prosphate Export Ass'n.*

C. OTHER RECENT FEDERAL COURT DECISIONS HAVE NOT DISMISSED SIMILAR ACTIONS AS MOOT

Numerous other federal district courts throughout the country have also considered the issues presented by the 10% minority business enterprises provision of the PWE Act. *E.G., Virginia Chapter, Associated General Contractors v. Kreps,* 444 F.Supp. 1167 (W.D. Va. 1978); *Wright Farms Construction, Inc. v. Kreps,* 444 F.Supp.

1023 (D. Vt. 1977), holding the 10% race quota unconstitutional; *Fullilove v. Kreps,* 443 F.Supp. 253 (S.D.N.Y. 1977); *Carolinas Branch, Associated General Contractors v. Kreps,* 442 F.Supp. 392 (D.S.C. 1977); *Constructors' Ass'n v. Kreps,* 441 F.Supp. 936 (W.D. Pa. 1977); *Montant Contractors' Ass'n v. Kreps,* 439 F.Supp. 1331 (D. Mont. 1977).[27]

In addition, and more importantly, three recent decisions of separate Courts of Appeals for different Circuits, while essentially reaching a different conclusion than that reached by this Court with respect to the constitutionality of the 10% race quota provision, have recently ruled on the same issues presented in this action, without any hint or suggestion that the actions are moot. On March 7, 1978, the Court of Appeals for the Third Circuit held that the district court did not abuse its discretion in declining to issue a preliminary injunction against enforcement of the 10% provision. *Constructors' Ass'n v. Kreps,* 573 F.2d 811 (3d Cir. 1978). On July 7, 1978, the Court of Appeals for the Sixth Circuit also upheld the constitutionality of the 10% MBE provision. *Ohio Contractors' Ass'n v. EDA,* ——— F.2d ——— (6th Cir. 1978). And on September 22, 1978, the Court of Appeals for the Second Circuit reached the same conclusion. *Fullilove v. Kreps,* ——— F.2d ——— (2d Cir. 1978).

While disagreeing with these decisions on the merits of their respective conclusions, the Court notes that none of these three recent appellate decisions found the questions involved in those cases to be moot. Most significantly, the decision of the Second Circuit in *Fullilove v. Kreps* recognizes that the Supreme Court remanded our

[27] *See also* Virginia Chapter, Associated General Contractors v. Kreps, 444 F.Supp. 1167, 1176-77 (W.D. Va. 1978); Wright Farms Construction, Inc. v. Kreps, 444 F.Supp. 1023, 1029 nn. 8 & 10 (D. Vt. 1977); Fullilove v. Kreps, 443 F.Supp. 253, 255 n.3 (S.D.N.Y. 1977) (all citing other cases).

instant case for consideration of the question of mootness, ——— F.2d at ——— (typed opinion at 17), but does not discuss the question of mootness at all in its opinion. While the posture of these appeals differs somewhat from the posture of this case, these respected Courts would certainly have recognized that the cases before them were moot if, as the defendants and intervenors argue here, no case or controversy exists. If these Courts had been faced with a situation in which no case or controversy exists, then those Courts would not and could not have decided those cases. But because these Courts, as recently as one month ago decided the issues presented by the 10% quota provision on the merits, it is apparent that they support this Court's conclusion that the instant case is not moot. And it is specially intriguing to note that apparently in none of these cases did any of the defendants, including the federal defendant in our case, make any argument that the cases were moot!

IV. MERITS OF THE UNDERLYING CONTROVERSY IN THE WAKE OF THE *BAKKE* DECISION

Counsel for the Armistead-Hill group of intervenors suggested, in his initial brief re mootness, that the Supreme Court's decision in *Regents of the University of California v. Bakke,* ——— U.S. ——— (1978), does not invalidate the minority business enterprises provision of 42 U.S.C. § 6705(f)(2).[28] The Court feels to the contrary, however, and believes that language from the majority opinion of Mr. Justice Powell in *Bakke* supports this Court's view that while affirmative action is permissible,

[28] Intervenors' Brief, at 5-10 (filed September 12, 1978). *See also* Memorandum for the Secretary of Commerce on the Question of Mootness, at 2 n.1 (filed September 11, 1978).

racial quotas[29] are impermissible and unconstitutional. In section III, A of his opinion, Mr. Justice Powell, joined by Chief Justice Burger and Justices White, Stewart, Rehnquist, and Stevens, wrote:

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

——— U.S. ——— (slip opinion at 20). Similarly, in section IV, A of his opinion, Mr. Justice Powell, joined by Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens, wrote:

> Preferring members of any one group for no reason other than race or ethnic origin is discriminatory for its own sake. This the Constitution forbids.

——— U.S. ——— (slip opinion at 37-38).

Moreover, the Supreme Court held in *Bakke* that legislative classification based on race, even so-called "benign" classifications designed to benefit minority group members, are subject to strict judicial scrutiny and that, in order to be found constitutional, the Court must find that the legislature used "necessary" means to promote a legitimate, substantial interest. In this case, however, this Court has previously found, and continues to believe that means of promoting employment of minority group contractors less intrusive than the 10% racial quota enacted by Congress existed. As pointed out in the Court's original decision, the MBE provision does not limit itself

[29] The *Bakke* opinion discusses the meaning of the word "quota" as opposed to the term "goal" and ultimately concludes that the semantic distinction, at least in that case, is meaningless: "Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status." ... U.S. at .... (slip opinion at 19-20).

to businesses which have previously experienced a prescribed level of income or unemployment. In addition, Congress has never demonstrated that affirmative action plans in this industry are not feasible. Furthermore, the 2-15% MBE provision in the most recent bills introduced in Congress, while still maintaining a quota system, may indeed be less intrusive than the original strict 10% quota system. Thus, in the wake of *Bakke*, the Court reiterates its views that the 10% race quota was not a constitutionally acceptable means of promoting the Congress' legitimate interest in promoting employment in the construction industry among minority group members.

ORDER

Pursuant to the Order of the United States Supreme Court of July 3, 1978, and in accordance with the reasoning set forth in the Memorandum Opinion hereinabove set forth,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That the motions to intervene of the Armistead-Hill group and the NAACP are hereby granted, limited to the question of mootness and future proceedings from and after this date.

2. That upon due consideration of the question of mootness, the Court finds and holds that the case, cause and issues herein are not moot.

3. That the motions of the defendants and intervenors to dismiss the action as moot are hereby denied.

4. That the judgment of the District Court in these causes dated November 2, 1977, is hereby reinstated in full. See 441 F.Supp. 955, 1044 (C.D. Cal. 1977).

5. That each party shall bear his, her and its own costs of suit incurred herein.

6. The Clerk of Court is directed to file the original and serve copies of this Memorandum Opinion and Order forthwith upon counsel for all parties herein, including intervenors.

DATED: October 20, 1978

A. ANDREW HAUK

A. Andrew Hauk
United States District Judge

Attorney(s)
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Appellants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHARLES ARMISTEAD, ET AL. *Plaintiff(s)* *vs.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, ET AL. *Defendant(s)*	CASE NUMBER CV 77 3738 AAH PROOF OF SERVICE/ ACKNOWLEDGMENT OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause. On 12-14, 1978, I served a true copy of JURISDICTIONAL STATEMENT ☐ by personally delivering it to the person(s) indicated below in the manner as provided in FRCiv.º 5(b); ☐ by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following: *(list names and addresses for person(s) served. Attach sheets if necessary.)*

Schedule attached.

I hereby certify that I am a member of the Bar of the U.S. District Court, Central District of California.

Place of Mailing; Pasadena, California

Executed on 12-14-78 at Pasadena, California

CHARLES B. JOHNSON

Signature of person
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ANDREW HAUK
District Court Judge
312 N. Spring
Los Angeles, California

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1108
SECRETARY OF COMMERCE, *et al.*, *Appellants*,
vs.
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, *et al.*, *Appellees*.

No. 78-1114
SECRETARY OF COMMERCE, *et al.*, *Appellants*,
vs.
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, *et al.*, *Appellees*.

No. 78-1382
JUANITA KREPS, SECRETARY OF COMMERCE, *Appellant*,
vs.
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, *et al.*, *Appellees*.

No. 78-1107
CHARLES ARMISTEAD; MARION HILL; LEO WEBB, *et al.*, *Appellants*,
vs.
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, *et al.*, *Appellees*.

No. 78-1442
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *Appellant*,
vs.
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, *et al.*, *Appellees*.

Appeal from the United States District Court
Central District of California

MOTION TO AFFIRM

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Appeal from the United States District Court
Central District of California

MOTION TO AFFIRM

Pursuant to Paragraph 1(c) of Revised Rule 16 of this Court, Associated General Contractors of California; Engineering Contractors Association; American Subcontractors Association; Los Angeles County Chapter, National Electrical Contractors Association, Inc.; Steve P. Rados, Inc.; Griffith Company; Gordon H. Ball, Inc.; Stoddard Enterprises; and Granite Construction Company, appel-

lees (hereinafter Contractors), move that the judgment of the District Court be affirmed. The judgment is now reported at 441 F. Supp. 955 (C.D. Cal. 1977). The opinion of the District Court addressing the issue of mootness on remand is reported at 459 F. Supp. 766 (C.D. Cal. 1978).

QUESTIONS PRESENTED

1. All appellants have presented the question whether the District Court erred when it determined that this case was not moot.

2. All appellants, except Charles Armistead, *et al.*, have presented the question whether the District Court erred when it determined that Section 103(f)(2) of the Public Works Employment Act of 1977 violated the equal protection guarantees of the Fifth Amendment to the United States Constitution and was inconsistent with Title VI of the Civil Rights Act of 1964.

3. City of Los Angeles and its various political entities have also questioned whether the District Court erred in holding that Contractors had standing to sue and need not exhaust their administrative remedies.

STATUTE INVOLVED

The provision of the statute involved in this appeal is Section 103(f)(2) of the Public Works Employment Act of 1977 (Pub. L. No. 95-28). Section 103(f)(2) amends Section 106 of the Local Public Works Capital Development and Investment Act of 1976 (42 U.S.C. § 6705) and provides:

"(2) Except to the extent that the Secretary determines otherwise, no grant shall be made under this Chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

STATEMENT OF THE CASE

The Statutory Scheme

On July 22, 1976, the United States Congress enacted the Local Public Works Capital Development and Investment Act of 1976 (42 U.S.C. §§ 6701, *et seq.*) (hereinafter the Public Works Employment Act of 1976). This Act appropriated $2 billion of federal monies for which state and local entities could make application in order to alleviate unemployment and improve public works facilities. This Act specifically forbade discrimination:

> "[O]n the grounds of race, religion, color, national origin, or sex . . . under any program or activity funded in whole or in part with funds made available under this subchapter." 42 U.S.C. § 6727(a).

On May 13, 1977, Congress enacted the Public Works Employment Act of 1977 (Pub. L. No. 95-28), amending the 1976 Act. The amendments, among other things, in-

cluded the provision quoted in full above, which required that at least 10 percent of the dollar value of each project grant be expended with certain minority business enterprises. On May 27, 1977, the Secretary of Commerce (hereinafter Secretary) issued regulations implementing Public Law No. 95-28. These regulations restated the statutory requirement that no grant would be made under the Act unless at least 10 percent of the grant amount is expended with minority business enterprises. 42 Fed. Reg. 27,434-35 (May 27, 1977).

The Secretary had until September 30, 1977, to obligate the funds appropriated by Congress under the 1977 Act. In September, 1977, Los Angeles City and County and their entities (hereinafter local appellants) began announcing bid requests for projects already approved for federal funding, with bid opening to begin in October, 1977.

The Proceedings to Date

On October 5, 1977, Contractors filed their Complaint for Declaratory and Injunctive Relief in the United States District Court for the Central District of California. In their complaint, Contractors sought a declaration that the minority business enterprise (hereinafter MBE) requirement of the Public Works Employment Act of 1977 and the actions of the Secretary and local appellants pursuant to this requirement were unconstitutional. They further sought an injunction preventing the Secretary from mandating that local appellants require bidders to comply with the 10 percent minority business enterprise quota, preventing the Secretary from taking actions penalizing noncompliance with the minority quota and from taking any

other action in regard to the requirement. An injunction was also sought preventing local appellants from utilizing the minority requirement in their bid specifications for and awards of contracts for projects funded by the Public Works Employment Act of 1977.

On October 6, 1977, Contractors moved for and were granted a temporary restraining order restraining the Secretary from granting any further funds to Los Angeles City and County under the Public Works Employment Act of 1977 for projects which required the 10 percent minority business enterprise allocation and restraining the local defendants from awarding bids for projects funded by the Act which required the minority allocation.

A hearing on Contractors' motion for preliminary injunction was set for October 31, 1977. On October 21, 1977, the Secretary filed a motion for summary judgment. Both motions were heard on October 31, 1977, at which time local appellants and Contractors also moved for summary judgment. The District Court then proceeded to hear the case and rule on the merits by consolidating the hearing on preliminary injunction with the hearing on the permanent injunction under Federal Rule of Civil Procedure 65(a)(2).

The District Court determined first that Contractors had standing to seek relief and need not exhaust administrative remedies. Second, it ruled on the merits that the statute, regulations, and procedures of all defendant-appellants were unequivocally unconstitutional under the Fifth Amendment to the United States Constitution and were inconsistent with Title VI of the Civil Rights Act of

1964. Third, the court issued an injunction which prevented enforcement of the minority business enterprise requirement for projects funded under the Public Works Employment Act of 1977 only after October 31, 1977, in the case of the Secretary of Commerce and January 1, 1978, in the case of Los Angeles City and County.

All parties appealed to this Court. Contractors sought to have the District Court's injunctive order broadened, while the Secretary and local appellants sought to have the judgment overturned. On July 3, 1978, this Court vacated the District Court's judgment and remanded the case to the District Court to consider the question of mootness.

On October 16, 1978, the District Court held its hearing regarding the question of mootness. Following this hearing, the court, on October 20, 1978, issued its determination that the case was not moot, reinstated in full its prior opinion, and allowed the intervention of Charles Armistead, *et al.*, and the National Association for the Advancement of Colored People.

On November 16 and 17, 1978, the present appellants appealed to this Court.

ARGUMENT

I

THE CASE IS NOT MOOT

All the appellants have argued that the present case appears to be moot and that the District Court committed error in failing to make a determination of mootness. However, a finding of mootness can be made only after a court has examined all the circumstances to determine whether a substantial controversy exists between the litigants. *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 122 (1974). In making this determination in numerous cases which have come before it, this Court has set forth a series of so-called exceptions to the mootness doctrine. These exceptions establish that if certain factors exist, a case, which at first blush might appear to be moot, will not be so found. In the present case, certain of these exceptions operate to indicate that, as determined by the District Court, the case is not moot.

A. The Circumstances Involved Are Capable of Repetition Yet Would Evade Review

In *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498 (1911), this Court reached the merits of a case based on an order of the Interstate Commerce Commission even though the order had expired. In addressing the issue of mootness, the Court held:

> "The question involved in the orders of the Interstate Commerce Commission are usually continuing . . . and these considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government,

and at another time the carriers, have their rights determined by the Commission without a chance of redress." *Southern Pacific Terminal,* 219 U.S. at 515.

The *Southern Pacific Terminal* ruling has led to a series of cases which indicate that appellate review of a case will not be foreclosed simply because certain of the circumstances involved with the situation attacked have ceased to exist, if the underlying dispute between the parties is capable of recurring, but, because of time constraints, is unlikely to reach appeal before the situation has again ceased to exist. *See Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976). Following this reasoning, the District Court ruled that the present case could not be considered moot inasmuch as it was capable of repetition, yet would evade review.

The Secretary has argued that the standard of "capable of repetition" cannot be applied here on the grounds that the governmental activity under the challenged statute has ceased, in that all but one of the contracts funded under the Public Works Employment Act of 1977 have been let, and that Congress has not acted to extend the program. As will be discussed below, governmental activity, taken pursuant to the challenged legislation, which affects Contractors, has *not* ceased. However, even were this not the case, the fact that Congress, while still considering an extension of the challenged provisions, has not yet acted to extend the program, does not require a finding that such program is not "capable of repetition."

First, the requirement is that the circumstances be "capable of repetition," not certain of repetition. In cases which have applied the requirement to defeat mootness,

this Court has used lenient standards regarding the speculative nature of the likelihood of recurrence. *Nebraska Press Association v. Stuart,* 427 U.S. at 546-47; *Moore v. Ogilvie,* 394 U.S. 814 (1969). The facts of the present case clearly indicate that these standards have been met.

Since the spring of 1978, there have been numerous attempts to extend the federal assistance rendered by the Public Works Employment Acts of 1976 and 1977 and to extend the MBE program outlined in Section 103(f)(2) of the 1977 Act. *Associated General Contractors v. Secretary of Commerce,* 459 F. Supp. 766, 774-75 (C.D. Cal. 1978) (hereinafter *Associated General Contractors II*). Although Congress adjourned in 1978 without acting upon any extending legislation, renewed attempts at extension are presently being made.

Hearings before the House Subcommittee on Economic Development are currently being held on H.R. 2063, a bill to amend the Public Works and Economic Development Act of 1965 (42 U.S.C. §§ 3121, *et seq.*), to extend the authorizations for three years. The staff of the Subcommittee on Economic Development of the Committee on Public Works and Transportation has informed counsel for Contractors that efforts will be made to incorporate into the bill the features of and assistance rendered by the Public Works Employment Acts of 1976 and 1977. Thus, it appears that the federal government is firmly committed to an extension of the challenged program. Indeed, certain appellants concede the fact that "Congress will most certainly renew the Public Works Employment Act despite the controversy over the 10% minority preference." Jurisdictional Statement of Charles Armistead, *et al.,* at 8.

Second, the fact that Congress may enact an MBE provision that differs somewhat from the one challenged is not, as argued by the Secretary, dispositive of a mootness determination. As was noted by the Ninth Circuit Court of Appeals in *Williams v. Alioto,* 549 F.2d 136, 143 n.8 (9th Cir. 1977):

> "The repetition/evasion exception [to the mootness doctrine] does not require a repetition of the exact law or behavior. The focus is on whether the same issues, arising from a repetition of a similar law or action, are likely to recur. *See Southern Pacific Terminal Co. v. ICC, supra,* 219 U.S. at 515, 31 S.Ct. 498."

Finally, in arguing that the possibility of future congressional action will not avoid mootness of this case, the Secretary cites a number of cases. Federal Jurisdictional Statement at 11-12. Neither the fact situations nor the reasoning of this Court in any of these cases can be applied to the present case. In *Preiser v. Newkirk,* 422 U.S. 395 (1975), the facts revealed that it would be virtually impossible for defendants to act again toward plaintiff as they had previously. This situation is contrary to that presented herein where the facts indicate that action to carry out activity similar to that challenged has and is being considered. The citations to *Allee v. Medrano,* 416 U.S. 802 (1974), and *Hall v. Beals,* 396 U.S. 45 (1969), are equally inappropriate. In both these cases the statute involved in the challenge had been repealed and replaced with new legislation. In the present case, as noted by the District Court, Congress has neither amended nor repealed the MBE provision of the Public Works Employment Act of 1977 and there are definite indications that the program will be continued. *Associated General Contractors II,* 459

F. Supp. at 775. Further, as will be discussed, significant governmental activity is presently continuing under the challenged statute.

Similarly, the mootness determination in *Golden v. Zwickler,* 394 U.S. 103 (1969), cannot legitimately be applied to the facts of the present case. In *Zwickler,* mootness was determined based upon a change in plaintiff's position which had removed the effect of the challenged practices upon him. This is obviously not the situation in the present case wherein it is defendants' rather than plaintiffs' conduct which has altered. Unlike the plaintiff in *Zwickler,* Contractors, being nonminority general contractors and subcontractors who have the desire and capability to bid on local public works projects, are certain to be affected no matter what the future action of Congress or defendants in regard to MBE participation in these projects. Finally, the Secretary's citation of *O'Shea v. Littleton,* 414 U.S. 488 (1974), is puzzling as well as inappropriate. Not only does the issue in *Littleton* involve an assessment of the plaintiffs' rather than defendants' activities, as in *Zwickler,* but also the ruling of the Court simply does not address the mootness issue.

The Secretary has also argued that the "yet evading review" portion of the "capable of repetition, yet evading review" mootness exception cannot be applied to the present case. This argument, however, is also without foundation. The Public Works Employment Act of 1977, the congressional proposals to extend it in 1978, and most likely future proposals, have been designed for the purpose of getting money into local projects as quickly as possible. Because of this, Section 6705(d) of Title 42,

United States Code, requires that work on construction of federally funded projects must, under ordinary circumstances, begin within 90 days of project approval. In the present case, the original complaint was filed on October 5, 1977, five days after the deadline for allocation of federal funds for projects. The District Court found that:

> "Any earlier action by plaintiffs would not have defined a concrete controversy, since additional projects might have been approved by the Secretary until September 30." *Associated General Contractors v. Kreps,* 441 F. Supp. 955, 963 (C.D. Cal. 1977) (hereinafter *Associated General Contractors I*).

Thus, the time between filing a viable suit, as defined by the District Court, and contract letting, which the Secretary indicates signals the end of an active controversy for purposes of review, is extremely short—*90 days at the most.* It goes without saying that if this period were used to confine appellate review, such review would be impossible.

In arguing that this case should not be considered one which evades review, the Secretary has indicated that the case has become moot, not because of the time constraints involved in the situation, but because of the District Court's order which did not enjoin defendants' contracting procedures. Federal Jurisdictional Statement at 13. Apparently, the Secretary is arguing that because the District Court could have enjoined these procedures, but did not, the situation is not one which would ordinarily evade review before the end of contracting.

Leaving aside for the moment a recitation of the ambiguous activity of the Secretary which perhaps induced the District Court to issue its order in the terms which it

did (*Associated General Contractors II,* 459 F. Supp. at 778-79), Secretary's argument cannot withstand close scrutiny. Obviously, if carried to its logical conclusion, it would work to deny review to plaintiffs who were appealing from losing judgments in these types of cases.[1]

Further, in *Dunn v. Blumstein,* 405 U.S. 330, 333 n.2 (1972), this Court discussed the "capable of repetition, yet evading review" standard in the context of a challenge to an election law which had initially prevented the plaintiffs from voting, but which because of the passage of time did not, at the time of review, prevent voting. From this discussion, it is apparent that it is the situation created by the operation of time and the statutory scheme challenged, not by the court's order, which is important in determining whether the case is one which would evade review.[2]

Thus, it is clear that the situation which led to the present lawsuit, statutory imposition of a minority business enterprise quota for federal public works projects, is capable of repetition. Indeed the facts make it clear that such repetition is likely. It is also obvious that because of the time constraints involved in emergency federal relief

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[1]It should be noted that the Secretary did not even raise the mootness issue before the Second Circuit Court of Appeals to which plaintiffs therein appealed a losing judgment. *Fullilove v. Kreps,* 584 F.2d 600 (2d Cir. 1978), *petition for cert. pending,* No. 78-1007. *See Associated General Contractors v. Secretary of Commerce,* 459 F. Supp. 766, 779-80 (C.D. Cal. 1978).

[2]In *Dunn v. Blumstein,* 405 U.S. 330 (1972), the District Court could have preserved the status quo with respect to the election in which Blumstein was prevented from voting by allowing him to cast a sealed provisional ballot. *Id.* at 332, n.2. However, the District Court refused this option and this Court did not consider this significant in its discussion of the "capable of repetition, yet evading review" standard.

programs such as the one challenged, appellate review could not be completed before the circumstances inherent in the situation challenged again ceased to exist. Therefore, as determined by the District Court, the facts of this case fit squarely within the "capable of repetition, yet evading review" exception to the mootness doctrine and it is submitted this ruling should be upheld.[3]

B. The W. T. Grant—Concentrated Phosphate Exception to Mootness Applies to this Case

The Secretary has alleged that the conduct of which Contractors complain has ceased in that all contracts but one funded by the challenged legislation have been let. However, cessation of allegedly illegal conduct will not, in itself, render a case moot. When the legality of the defendants' actions has been questioned in a declaratory relief action, the cessation of defendants' conduct involved in the initial action will not necessarily deprive this Court of jurisdiction if something still remains to be determined. *Super Tire,* 416 U.S. at 121-22; *United States v. W. T. Grant Co.,* 345 U.S. 629, 632 (1953). If the defendant is free to return to his old ways, "[t]his, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." *Id.*

The burden of showing mootness in this situation is upon the defendant. In *W. T. Grant Co.,* 345 U.S. at 633, the Supreme Court indicated:

[3]It is interesting to note that Justice Harold Leventhal of the United States Court of Appeals for the District of Columbia Circuit has indicated his belief that a "case" involving the fact situation presented herein would not be moot "[i]n view of the doctrine that carves out an exception to mootness for probably recurring controversies." *American Bar Association Journal* 65:214 (1979).

> "The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' [Footnote omitted.] The burden is a heavy one."

After completing an analysis of *W. T. Grant Co.* and *United States v. Concentrated Phosphate Export Association,* 393 U.S. 199 (1968), which expanded *W. T. Grant Co.,* the District Court concluded that the Secretary had not met her burden of demonstrating nonrecurrence. The court, therefore, held that the *W. T. Grant—Concentrated Phosphate* doctrine must be applied to defeat mootness in the current case.

The Secretary has challenged this holding apparently on the theory that it cannot be applied unless the court has determined that the defendant "is simply waiting for the dismissal of the action to resume the challenged conduct." Federal Jurisdictional Statement at 14. This theory is without merit. What *W. T. Grant Co.* and *Concentrated Phosphate Export Association* require is a determination by the court, based on a showing made by defendant, "that 'there is no reasonable expectation that the wrong will be repeated.'" *W. T. Grant Co.,* 345 U.S. at 633. Thus, there does not have to be any determination that the wrong *will be* repeated upon a dismissal, merely a finding, as made by the District Court herein, that defendant has not convinced the court that the wrong *will not be* repeated. *St. Paul Fire & Marine Insurance Co. v. Barry,* 46 U.S.L.W. 4971, 4973 (1978).

The propriety of the District Court's ruling in this regard is confirmed by this Court's discussion in *Concentrated Phosphate Export Association,* 393 U.S. at 203:

> "The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.' [Citations omitted.] A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. But here we have only appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes."

In the present case, unlike that in *Concentrated Phosphate Export Association,* we are without even a statement by the Secretary that she does not intend to continue the practice of allotting federal funds on the basis of race or national origin. Indeed, it is unlikely that she could make this assertion since continued efforts have been made to extend the challenged program.

Further, as related by the trial court, the course of conduct pursued by the Secretary during this litigation is replete with the making of erroneous factual assertions regarding both the merits and possible mootness of this case. *Associated General Contractors II,* 459 F. Supp. at 778-79. Since the Secretary's assertion in March, 1978, that there were no contracts containing the MBE provision remained to be let in Los Angeles (Federal Jurisdictional Statement filed in *Kreps v. Associated General Contractors of California,* No. 77-1271, at 6-7), the facts as described below reveal that such contracts have been and still are

being let. This conduct alone precludes the Secretary from carrying her heavy burden of persuasion.

Indeed, in *Mills v. Green,* 159 U.S. 651, 654 (1895), this Court established the rule that the events which raise the issue of mootness must take place free from any fault on the part of defendant. The Secretary's activity before the District Court which clouded the issues in respect to the status of funds remaining to be disbursed in October, 1977 (*Associated General Contractors II,* 459 F. Supp. at 778-79), and the misstatements made in her initial Jurisdictional Statement in this case (*Kreps v. Associated General Contractors of California,* No. 77-1271, at 6-7), appear themselves to constitute that degree of fault which would prevent a court from making a determination of mootness contrary to the interest of Contractors in this case. In fact, as was noted by the District Court, it appears that part of the official strategy of the federal government in this case was to stall the litigation for as long as possible in order to keep the funds flowing. *Associated General Contractors II,* 459 F. Supp. at 776 n.19.

C. The Challenged Program Has Continuing Effect Upon Contractors

While the District Court's decision regarding the mootness issue in this case was based upon its analysis of the "capable of repetition, yet evading review" and *W. T. Grant—Concentrated Phosphate* exceptions to the mootness doctrine, there is yet another reason which mitigates against a finding of mootness in the present case. In *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175 (1968), this Court held that a challenge to a

ten-day restraining order was not moot in spite of the fact that the order had long since expired. This reasoning was based not only upon the finding that the challenged order was "capable of repetition, yet evading review" but also upon a finding that the order had continuing effect on the petitioner's activities. *Id.* at 178-80.

In the present case, this continuing effect may similarly be felt. The injunctive relief ordered by the District Court did "not govern or apply to Federal funds heretofore granted [before October 31, 1977] or to any actions by Federal Defendants with respect to such funds heretofore granted." 441 F. Supp. at 1044. Therefore, since the federal funds allocated under the challenged program had been allotted by October 31, 1977, Contractors are forever prevented from challenging allocations or contracts even if contracts must be rebid due to lack of initial response or unsatisfactory performance or if the award of any contracts has been delayed.

As conceded by the Secretary, both in her initial Jurisdictional Statement in this case and in her present statement, if any such contracts are still outstanding, a live controversy may remain. Federal Jurisdictional Statement at 15. Contrary to her initial statements that all contracts had been let, the Secretary now admits that one contract remains outstanding. Federal Jurisdictional Statement at 7. This in itself would seem to be enough to preserve the issues of the present case on appeal. However, Contractors have learned that, in addition to the Charmlee Park project referred to by Secretary, as of the date of her Jurisdictional Statement, contracts for four other projects funded

by the Public Works Employment Act of 1977 had not yet been let! Indeed, for one of these projects, bids had not even been advertisd.[4] This continuation of activity regarding contracts funded under the Act clearly negates the mootness issue in this case, inasmuch as it makes clear the continuing effect of the challenged activity and the court's order upon Contractors.

In reference to this approach, Secretary has argued that since the District Court did not make its determination in regard to mootness based on the continuing effect on Contractors, that court's judgment should be vacated as moot, "without prejudice to the plaintiffs' right to refile the action if they can show some ground on which the case may continue to present a live controversy." Federal Jurisdictional Statement at 16. Not only does this suggestion indicate a lack of appreciation for the concept of judicial economy, it also fails to consider the fact that this Court must affirm the lower court's determination regarding mootness if it is correct on *any* grounds. As was noted by this Court in *Helvering v. Gowran,* 302 U.S. 238, 245 (1937):

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

In summary, it is submitted that the District Court correctly determined that the present case cannot be found moot. The defendant-appellants have not shown that the

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[4]Contracts were not let for Rancho Los Amigos Power Station, Phase III; the Music Center Mall Garage Ventilating System; and the Sun Village Water Main Avenue Q until the end of March, 1979. Bids have not yet been advertised for the demolition of the old John Wesley Hospital.

controversy is unlikely to occur again and if this recurrence takes place, review may well be impossible before all contracts have been let. Finally, the activities of defendant-appellants and the order of the District Court will have continued effect on Contractors. Therefore, it is submitted that this Court should affirm the decision of the District Court in regard to mootness.

II

THE JUDGMENT OF THE DISTRICT COURT IN REGARD TO STANDING, EXHAUSTION, AND THE MERITS SHOULD BE AFFIRMED

A. Standing and Exhaustion

Local appellants' questions regarding exhaustion of administrative remedies and standing present clearly insubstantial issues. The holding of the trial court which did not require exhaustion is undeniably correct. In fact, it is questionable whether Contractors had any remedies to exhaust. While waiver of the MBE requirement was a theoretical possibility under the 1977 Act, it was available not to Contractors, but only to Los Angeles City and County as grantees. Even if Contractors had access to the waiver procedures, however, exhaustion would not be required under this Court's holding in *Public Utilities Comm'n v. United States,* 355 U.S. 534 (1958), since the administrative proceedings could not dispose of the underlying constitutional challenge posed by Contractors.

In a similar manner, the ruling of the trial court in regard to Contractors' standing is without error. The federal law of standing requires a showing of immediate or

threatened injury to individual plaintiffs or members of plaintiff associations from the challenged action. *Warth v. Seldin,* 422 U.S. 490, 511 (1975). The facts presented to the District Court amply demonstrated this injury to Contractors in that, among other things, the minority business enterprise requirement excluded certain nonminority plaintiffs from consideration for jobs and required others to bid on jobs on unfamiliar or perceivedly illegal terms or to forego bidding entirely. Inasmuch as the case law, including prior rulings by this Court, conclusively indicates that Contractors herein have both standing and no obligation to exhaust administrative remedies, these issues present insubstantial questions for this Court.

B. The Merits

The decision of this Court in *Regents of the University of California v. Bakke,* ..... U.S. ....., 46 U.S.L.W. 4896 (1978), reemphasizes the holding of the District Court that the MBE provision of the Public Works Employment Act of 1977 is unconstitutional and illegal.

In *Bakke,* the Court addressed the issue of whether the Fourteenth Amendment to the United States Constitution and/or Title VI prevented the utilization of a medical school admissions program which reserved at least 16% of its available places for minority group members and, in effect, established two separate admissions programs, one for designated minorities and one for whites.

Justices Stevens, Stewart, Rehnquist, and the Chief Justice would have decided the case on the basis of Title VI alone, stating that the statute must have a "colorblind" application which prevents the exclusion of *any* person

from a federally funded program on the ground of race. Specifically, these four justices stated:

> "[T]he meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program." *Id.* at 4935.

The Title VI opinion of these four justices did not constitute a majority in *Bakke*. However, when the opinion of Justice Powell in regard to Title VI is considered, it is apparent that the decision of a majority of the Court's members supports the trial court's ruling finding that the MBE program here at issue is invalid and illegal under Title VI.

Justice Powell, in *Bakke,* went beyond the Title VI issue and held that the manner in which the university utilized race to exclude individuals violated Bakke's equal protection rights guaranteed by the Fourteenth Amendment. In dealing with Title VI, Justice Powell indicated that:

> "[e]xamination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution." *Id.* at 4900.

Therefore, in Justice Powell's opinion, if a federally funded activity violates the Constitution's guarantees in regard to racial treatment, it also violates Title VI. As will be discussed, the MBE program clearly violates equal protection as construed by Justice Powell.

At the onset, in dealing with the constitutional question the District Court correctly noted that in utilizing the minority business enterprise requirement, the Public Works

Employment Act of 1977 set forth a classification based solely upon race. This Court has held that when faced with a constitutional equal protection challenge, such a classification must be subjected to strict scrutiny. *Loving v. Virginia,* 388 U.S. 1, 11 (1967). In order to pass this scrutiny, it has been further determined by this Court in the past, and confirmed by Justice Powell in *Bakke,* that a statute incorporating the classification must meet a compelling state interest and be drawn with precision and tailored to serve its legitimate objectives. If there are other reasonable ways to achieve its goals with a lesser burden on constitutionally protected activity, the government may not choose the way of greater interference. *Dunn v. Blumstein,* 405 U.S. at 343.

The District Court correctly determined that a minority preference, such as the one included in the Public Works Employment Act of 1977, cannot meet the compelling state interest standard. No holding by this Court contradicts this reasoning. As recognized by the District Court (*Associated General Contractors I,* 441 F. Supp. at 963), such a standard might be met if the preference were designed as a remedy for specific past discrimination. *Bakke,* 46 U.S.L.W. at 4906-07 (opinion of Justice Powell). However, it is clear from the limited legislative history available dealing with the challenged MBE provision that the quota was imposed without any findings of discrimination against minority businesses. It was designed primarily to give minority businesses a preference in order to grant them an arbitrary "fair share" of a federal program. 123 Cong. Rec. H1436-41; S3910. Under these circumstances, Justice

Powell, writing in *Bakke,* 46 U.S.L.W. at 4906-07, makes it clear that the program cannot pass constitutional muster:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. . . . Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus the government has no compelling justification for inflicting such harm." (Footnote omitted.)

Nor, as found by the District Court, can the minority requirement meet the other criteria of the strict scrutiny test. Under these criteria, the government must show that no other means exists to achieve its objective, assuming this is to be considered legitimate, which would be less constitutionally burdensome on those affected. *Dunn v. Blumstein, supra.* Clearly an enactment which totally excludes nonminority businesses from competing for $400 million (10 percent of the $4 billion allotted by the Public Works Employment Act of 1977) of federal funds is extremely burdensome. However, again, the limited legislative history of Section 103(f) shows that no other means of aiding minority enterprises was even considered.

Finally, the imposition of an arbitrary 10 percent nationwide minority preference is hardly drawn with precision. Nor can it be said to be tailored to meet its objectives. While the quota might give some minority businesses a "fair share" of federal funds, there is no attempt to ensure that these funds would go to alleviating employment

distress in the minority community, or to building up fledging minority enterprises.

In criticizing the District Court's decision, the Secretary urges that the MBE program is appropriately tailored to aid members of minority groups suffering discrimination and is flexible enough to satisfy the needs of nonminority contractors. Federal Jurisdictional Statement at 22-23. These arguments fail to note several factors. First, as the opinion of Justice Powell in *Bakke,* 46 U.S.L.W. at 4904, makes clear, the guarantees of equal protection extend to individuals, not groups. If any remedies for discrimination are to be fashioned legally, they must be created with the injured individuals in mind. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977); *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976). Neither the statutory language, the legislative history, nor the operation of the MBE program here at issue indicate any effort was made to aid any individuals suffering discrimination. As found by the District Court, the only criteria for preferential consideration here was racial and/or national affiliation. *Associated General Contractors I,* 441 F. Supp. at 965.

Furthermore, the purported flexibility of the challenged program, referred to by the Secretary, is little more than a sham. Upon examination of the Secretary's guidelines implementing the MBE program, the District Court in *Wright Farms Construction, Inc. v. Kreps,* 444 F. Supp. 1023, 1032 (D. Vt. 1977), found that the Secretary would not grant a waiver of the ten percent quota where there was even one MBE available in the area. Indeed, through-

out the course of this litigation, the Secretary has been unable to point to a single instance in which a waiver was granted. In *Bakke,* in at least one instance, the University did waive the quota to admit a nonminority. *Bakke,* 46 U.S.L.W. at 4898 n.6. Apparently, then, the MBE quota here is even more rigid than that invalidated in *Bakke.*

Therefore, it is apparent that the District Court correctly determined that the MBE requirement of the Public Works Employment Act of 1977 is both constitutionally and statutorily invalid. It is submitted that this determination should be summarily affirmed.

Contractors have asserted that the holding of the District Court on the issues of standing, exhaustion, and the invalidity of Section 103(f) of the Public Works Employment Act should be affirmed. However, Contractors are aware of the numerous cases dealing with the unconstitutionality of the minority preference in which varying determinations have been reached. Federal Jurisdictional Statement at 18 & n.7. Contractors are also aware that these varying determinations will engender confusion and controversy and be the subject of numerous further judicial proceedings. In view of these facts and the high likelihood that future preference programs similar to that in the Public Works Employment Act of 1977 will be enacted, this Court may wish to note probable jurisdiction and set this case for argument.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be summarily affirmed. In the alternative, probable jurisdiction should be noted.

Respectfully submitted,

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